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SUPREME COURT U. S.

In the Supreme Court of the United States.

UNITED STATES *vs.* JU TOY. } OCTOBER TERM, 1904. No. 535.

Now comes the petitioner, Ju Toy, by his attorneys, and prays the Court to stay its mandate in the above-entitled cause and grant him a re-argument thereof, for the reasons hereinafter urged.

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ARGUMENT.

The Court is not insensible to the far-reaching effect of its decision in this case and its influence upon the subsisting relations between this country and the Chinese Empire. This consideration is, of course, only suggested as an indication of the vital nature of the principle involved and the consequent necessity for its careful and correct determination.

The [redacted] ruling of the Court, if correct and sustained, obviously will have the effect of excluding a few more Chinese from entrance into this country, but will, on the other hand, seriously embarrass our commercial relations with China.

It is believed and very respectfully submitted that the conclusion reached by the majority of the Court is unsustained

by precedent and that owing no doubt to imperfect presentation of the case by counsel for Ju Toy, controlling considerations have been overlooked.

It is earnestly urged that the cases cited by the Court in its opinion as tending to support its conclusion, namely, the Japanese emigrant case, 189 U. S., 86; Chin Bak Kan *vs.* United States, 186 U. S., 193; Fok Young Yo *vs.* United States, 185 U. S., 296; and Lem Moon Sing *vs.* United States, 158 U. S., 538, specifically and distinctly have reference to Chinese persons who are admittedly aliens, and that such being the case, obviously their reasoning when applied to one admittedly an American citizen entirely fails.

In Fok Young Yo *vs.* United States, 185 U. S., 296, Chief Justice Fuller states the case as follows:

> But the facts agreed are simply that the petitioner was a *subject of the Empire of China*, arriving at the port of San Francisco, whose intended destination, as appeared by the manifest of the vessel in which he arrived and by his own allegation, was San Jose de Guatemala in the Republic of Mexico * * * and that the collector of customs at San Francisco denied him the privilege of further pursuing his journey to his alleged point of destination, and issued an order directing him to be detained and deported to China. The whole question in the case, therefore, is whether this denial and order of the collector were authorized by law.

Chin Bak Kan *vs.* United States, 186 U. S., 193, was affirmed solely because a constitutional trial was provided by statute, the Court saying:

> A United States Commissioner is a quasi judicial officer and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the district court and his decision was affirmed, so there was an adjudication by a United

> States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute.

But the Court in the present case concedes in its opinion that these cases are not conclusive of the point under discussion. But as they are all based more or less directly upon the fact that the claimant is an alien, it is difficult to see why they do not rather form an argument against the position of the Court than in its favor.

The Court further in its opinion says that the question involved in this case is no longer a new one, but counsel for appellee respectfully submit that the question was expressly left open and undecided in the case next cited.

In United States *vs.* Sing Tuck, 194 U. S., 160, in speaking of the act of 1894, this Court says:

> Whatever may be the law on that point, the decisions just cited are enough to show that it is too late to contend that the act of 1894 is void as a whole. But if the act is valid, *even if ineffectual on this single point*, then it points out a method of procedure which must be followed before there can be a resort to the courts.

It seems impossible to construe this language otherwise than as holding that the act can be valid as to Chinese not claiming to be American citizens and ineffectual as to those making such a claim. It is entirely upon the theory that such a construction can be given to the act that the cases referred to in the Sing Tuck case were decided. If such a construction could not be given to the act, those cases, it is submitted, would have met with a different fate, or the foundation for their decisions would have been unsupported.

The Court now says in its opinion in this case in reference to that act:

> It also is established by the former case (the Sing Tuck case) and others which it cites that the relevant portion of the act of August 18, 1894, c. 301, is not void as a whole. The statute has been upheld and enforced, but the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. * * * It necessarily follows that when such words are sustained that they are sustained to their full extent.

The conclusion in this case, then, is that the decision in the Sing Tuck case is sustained upon the theory that the act may be ineffectual as to certain persons though valid as to others, thus leaving undecided the constitutional question presented, while the decision in this case is founded upon the theory that the Sing Tuck case having decided that a portion of the act is valid, it is valid in its entirety and therefore the point presented directly in this case is no longer a new one for determination.

Respectfully submitted,

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